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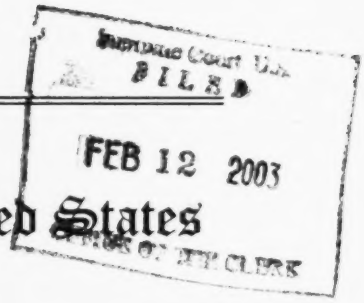

In The
Supreme Court of the United States

TIME WARNER ENTERTAINMENT COMPANY, L.P., *et al.*,

Petitioners,

v.

SIX FLAGS OVER GEORGIA, LLC, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The Court Of Appeals Of The State Of Georgia

BRIEF FOR SIX FLAGS OVER GEORGIA, LLC, *ET AL.*, IN OPPOSITION

JAMES E. BUTLER, JR.
GEORGE W. FRYHOFER III
BUTLER, WOOTEN, FRYHOFER, DAUGHTERY & SULLIVAN
2719 Buford Highway
Atlanta, Georgia 30324
(404) 321-1700

GERALD DAVIDSON, JR.
DAVIDSON & TUCKER, LLC
6700 Sugarloaf Parkway
Suite 500
Duluth, Georgia 30097
(678) 775-6853

EMMET J. BONDURANT II
Counsel of Record
H. LAMAR MIXSON
MICHAEL B. TERRY
JOSHUA F. THORPE
BONDURANT, MIXSON & ELMORE, LLP
3900 One Atlantic Center
1201 W. Peachtree St., NW
Atlanta, Georgia 30309
(404) 881-4100

Counsel for Respondents

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, Respondents Six Flags Over Georgia, LLC ("Flags"), Six Flags Fund, Ltd. (L.P.) ("Fund"), and George DeRoy, as Trustee of Six Flags Claims Trust, state the following:

Respondent Fund owns 99% of the membership interests in Respondent Flags. No publicly held company directly owns 10% or more of the membership interests in Flags.

Respondent Fund is a limited partnership. Its managing general partner is the Salkin Family Trust, created by declaration of trust dated May 15, 1980, Avram Salkin and Dorothy Salkin, co-trustees. The only corporate general partner of Fund is SFG, Inc., a California corporation, which is the non-managing general partner and owns a 0.1% partnership interest in Fund. SFOG Acquisition A, Inc. owns a 17.1% special limited partnership interest in Fund, and SFOG Acquisition B, L.L.C. owns an 8.2% special limited partnership interest in Fund. Upon information and belief, Six Flags Inc. (formerly known as Premier Parks Inc.) and AOL Time Warner Inc. may directly or indirectly own some or all of SFOG Acquisition A, Inc. and SFOG Acquisition B, L.L.C. AOL Time Warner Inc. and Six Flags Inc. are publicly held.

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BRIEF FOR SIX FLAGS OVER GEORGIA, LLC, *ET AL.*, IN OPPOSITION

Respondents Six Flags Over Georgia, LLC ("Flags"), Six Flags Fund, Ltd. (L.P.) ("Fund"), and George DeRoy, as Trustee of Six Flags Claim Trust, respectfully submit this brief in opposition to the petition for a writ of certiorari.

INTRODUCTION

The Petition does not accurately describe the Court of Appeals' opinions and the record evidence. Petitioners assert that the ten-judge "Whole Court" of the Georgia Court of Appeals unanimously "defied" this Court's GVR by holding on remand that Petitioners' due process challenge to the size of the punitive damages award had been abandoned under Georgia's appellate rules. Pet. 2. Petitioners label this state law holding as "pretext" and "entirely imaginary." Pet. 13, 17. Petitioners then claim that the Georgia Supreme Court violated its own rules by declining to review this state law finding. Pet. 21. In truth, as the opinion below reveals, the abandonment holding was based upon Petitioners' failure to preserve the issues under well-established rules of appellate procedure promulgated in 1965 and enforced regularly thereafter. It is Petitioners' characterization of this case and assertions of "defiance" that are "entirely imaginary."

Petitioners' exaggerations perhaps result from recognition that this express abandonment holding by the Georgia Court of Appeals is an adequate and independent state law ground for affirmance that deprives this Court of jurisdiction.

Even though Petitioners' failure to preserve any constitutional challenge was dispositive, the Court of Appeals alternatively conducted the very *de novo* review of the *BMW v. Gore* factors that Petitioners now claim never occurred. *Compare* Pet. App. 12a, 12a-16a (Court of Appeals: "we also review the punitive damages award *de*

novo and apply the *Gore* guideposts") *with* Pet. 13 (Petition: "the court refused to conduct the *de novo* review required by federal law and dictated by this Court's GVR."). In its thorough analysis, the Court of Appeals concluded: "[a]pplying a *de novo* standard of review and weighing the *Gore* guideposts, we find that the award of punitive damages under these circumstances does not violate appellants' federal due process rights." Pet. App. 16a. Contrary to Petitioner's hyperbole, those findings are not defiant, novel or incorrect. Indeed, given that the punitive damages award in this intentional tort case was only 1.3 times the amount of the actual damages, the Court of Appeals' holding is not remotely remarkable, and certainly nothing that warrants review by this Court.

Petitioners also claim to be victims of a unanimous Georgia jury and unanimous Georgia trial and appellate judges because they were supposedly "big out-of-state companies" and Respondents were "local interests." Pet. 1-2. Again, the truth is quite the opposite. *Petitioners themselves chose the venue for this suit* when they sued Respondents in state court in a suburb of Atlanta, Georgia, resulting in the assertion of *counterclaims* by Respondents. Petitioners chose that forum to adjudicate this dispute *because* Petitioners – all subsidiaries of what was Time Warner Inc. – are not truly out-of-state companies. Time Warner Inc.'s CNN, TBS, TNT, Cartoon Network, Turner Entertainment, Atlanta Braves, Atlanta Hawks, and Atlanta Thrashers operations (among others) are headquartered in Atlanta, Georgia. Petitioners' corporate representative at trial was an Atlanta resident, and their main witness in the punitive damages phase of the trial was Ted Turner, an Atlanta icon and the largest individual shareholder and Vice-Chairman of the Board of Time Warner Inc.

By contrast, Respondent DeRoy and the managing General Partner of Respondent Fund are from California

and the corporate general partner of Fund was a California corporation. The trial representative and primary witness for Respondents was a resident of Los Angeles, as the Georgia jury was informed. Petitioners lost this case on the merits because of the overwhelming evidence that they cheated their partners – not because they were "out-of-state companies."

Petitioners' recitation of the record evidence similarly differs so substantially from the record and the appellate opinions that it might as well be describing an entirely different case. As the Court of Appeals twice held, the record evidence in *this* case demonstrates that Petitioners "consciously and intentionally disregarded" their fiduciary duties to Respondents when Petitioners "carried out a plan to depress the value" of the Six Flags Over Georgia amusement park "by under-investing in it and then withholding information so that [they] could acquire the park at a discount." Pet. App. 55a, 33a. This was a "scheme to devalue their partners' investment for their own benefit" and "a premeditated plan surreptitiously executed over a period of years. . . . the very definition of 'reprehensible.'" Pet. App. 13a-14a. As a result of that "especially reprehensible" intentional tort, the jury, which found that Petitioners had *specifically intended to harm* their partners, imposed a punitive damages award that reflected the scale of Petitioners' wrongdoing but was *only 1.3 times* the now admitted and paid compensatory damages. Pet. App. 12a, 22a & n.3.

The Court of Appeals affirmed, "[a]fter closely scrutinizing over 80 volumes of record and transcript." Pet. App. 13a. After GVR to consider the effect of *Leatherman*, the whole court (ten judges) of the Court of Appeals again unanimously affirmed, concluding that

> "[G]iven the amount of intentional economic damage inflicted by the appellants, corporate entities with collective assets measured in billions of dollars, we believe the award of punitive damages

> was reasonably calculated to punish them and to deter such conduct in the future."

Pet. App. 15a.

Petitioners' alternative request for another GVR is no better than their argument for reversal. The pendency in this Court of *State Farm v. Campbell* affords no reason to GVR this case again. The extraterritoriality arguments that dominate *Campbell* are not at issue here.[1]

JURISDICTION

As discussed fully in the Reasons for Denying the Writ (*see infra* pp. 13-21), this Court lacks jurisdiction under 28 U.S.C. § 1257(a) because the federal questions Petitioners now raise were not presented to or decided by the Court of Appeals in the first instance, and were waived and abandoned under state law, as the Georgia Court expressly held. Resp. App. 1a.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant provisions of federal and Georgia statutes and of the United States Constitution are reproduced at Resp. App., *infra*, 1a-12a.

STATEMENT OF THE CASE

Unlike Petitioners' statement, which relies for "factual support" largely on citations to a brief *Petitioners* filed

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[1] Petitioners concede that *Campbell* is different from this case because "*State Farm* also presents an 'extra-territoriality' issue," (Pet. 25) which is absent from this case. In fact, even the allegedly common (but waived) "*BMW* guidepost" issues in this case are vastly different than those presented in *Campbell*, as described *infra* at 29-30.

below (Pet. App. 60a-70a),[2] the following statement is fully supported by citations to the opinions of the Court of Appeals and the trial record.

1. Between 1991 and 1997, Petitioners flagrantly abused their positions as general partner (or entities controlling that partner) of the Six Flags theme park in Atlanta, Georgia,[3] by engaging in various intentional, wrongful acts in clear contravention of the fiduciary duties they owed to their partners. At the heart of Petitioners' scheme was a plan to depress "the value of the park by under-investing in it and then withholding information so that it could acquire the park at a discount" once the partnership agreement between Petitioners and Respondents ended in 1997. Pet. App. 33a. The evidence showed a "scheme to devalue their partners' investment for their own benefit," "a premeditated plan surreptitiously executed over a period of years," and an "intentional breach of its fiduciary duty [that] revealed a callous indifference to the financial well-being of its limited partners" through conduct that was "deceitful, self-serving and financially damaging" and "especially reprehensible." Pet. App. 12a-14a.

Secret internal memoranda and presentations revealed that Petitioners consciously planned to "milk" the Georgia park by decreasing capital expenditures as the partnership agreement approached expiration. Pet. App. 29a.[4] Petitioners assert that they were required by the

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[2] Page limitations defeat any attempt to list, much less debunk, all of Petitioners' factual misstatements.

[3] The park was owned by Flags, a limited partnership. Petitioners were the general partner of Flags and entities that owned and controlled that general partner and were making the decisions for Flags. Fund was the sole limited partner of Flags.

[4] Time Warner states that it "satisfied its contractual duty to *invest* $800,000 per year," suggesting that capital improvements were made with Petitioners' funds (Pet. 7), but "all capital expenditures" in fact

(Continued on following page)

partnership agreement to invest only $800,000 per year in capital improvements to the park, but the Court of Appeals explicitly rejected that interpretation of the partnership agreement as a matter of state law.[5] As the Court of Appeals explained, not only did Petitioners' devious strategy constitute an objective violation of Petitioners' fiduciary "duty to act in good faith in making [capital improvement] decisions," but "the evidence shows that [Petitioners themselves] *never interpreted* the capital expenditures provision to mean they only had to invest $800,000 per year." Pet. App. 37a, 40a (emphasis added). To the contrary, Petitioners' top officer acknowledged and recognized that Petitioners had a duty to "maximize the performance" of the park. Pet. App. 40a.

A clear illustration of Petitioners' scheme was their calculated decision, shown by their own 1995 confidential memorandum, to delay the installation of "Batman the Ride" in order to reduce Respondents' "leverage in negotiating with other potential strategic partners in 1998 and beyond." Pet. App. 30a. Starving the park of capital expenditures, *such as* the Batman ride, depressed the park's value by almost $150 million, inducing weak offers from competing bidders. This allowed Petitioners to secure the park at a lower price in 1997. Pet. App. 29a-32a, 53a-54a.

The damage to Petitioners' partners was severe. The jury awarded approximately $149 million on the claim that Petitioners intentionally drove down the value and

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"[came] from the park's [*i.e.*, Respondent Flags'] surplus operating cash." Pet. App. 26a.

[5] There was also no evidence supporting Petitioner's argument about this "$800,000" provision. Indeed, the contrary testimony of Respondent's witness Salkin, who negotiated the partnership agreement, was uncontradicted. Simply put, "minimum" does not mean "maximum", as it must for Petitioners to have prevailed.

the prospective purchase price of the park.[6] The size and evidentiary support for this compensatory damages award cannot be challenged in this Court because Petitioners paid that award in full after losing on appeal below. Pet. 9. Nevertheless, Petitioners claim that "respondents have never explained how the installation of a $9 million ride could somehow increase the value of the Six Flags park by $150 million overnight." Pet. 20. First, that is a gross misstatement of this part of Respondents' damages claim. Pet. App. 26a-31a. Second, the devaluation claim was explained repeatedly at trial, through several expert witnesses. The Court of Appeals recognized that the mechanics of the valuation were relatively straightforward, as "[c]apital investment in an amusement park, especially in major thrill rides, fuels EBITDA (*i.e.*, "earnings before interest, taxes, depreciation, and amortization") growth, which in turn increases the value of the park." Pet. App. 29a. For example, the Batman ride was the most successful capital expenditure in the history of the Six Flags parks and had driven up EBITDA by 37 to 54 percent in the first year after it was installed at Time Warner's wholly owned parks in Chicago, New Jersey, Los Angeles, and St. Louis. Pet. App. 30a; PX 817 at 2; PX 970; PX 484 at 8. Amusement parks are valued, bought, and sold at a multiple of EBITDA, thus multiplying the effect of capital expenditures on value. Pet. App. 29a. This evidence flatly discredits the continued suggestion that appropriate capital expenditures – which were not limited to the Batman ride – could not boost the park's value by almost $150 million.

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[6] *See* Pet. App. 29a-32a, 53a-54a (Court of Appeals discussions of how withheld capital expenditures resulted in the figure for decreased park value awarded by the jury).

In addition to depressing the value and earnings of the park, Petitioners actively sabotaged Respondents' attempt to conduct a competitive auction for the park, chilling the interest of other bidders and inducing weak bids, by withholding and distorting financial information necessary to allow other prospective bidders to value the park accurately. Pet. App. 30a-31a; *see also* PX 20 (internal instructions to be "niggardly" in responding to Fund's requests for financial information and to "flatten out" projections). In violation of their fiduciary duties to Respondents, Petitioners bought land "immediately adjacent" to the park, "thus limiting the park's expansion opportunities" (Pet. App. 25a-26a); they used "confidential business information" from the park to "stud[y] the feasibility of developing a competing park" (Pet. App. 26a); they signed employment contracts including non-competition clauses with "key park executives" that would become effective after the partnership ended (Pet. App. 27a); and they "deferred" substantial maintenance and failed to make $7 to 10 million of "basic repairs" (*ibid.*). Petitioners' malevolent role in this process (most of which was revealed only by this litigation) undercuts any suggestion that Respondents voluntarily accepted Petitioners as "their fiduciary for another 30 years."[7] Pet. 6.

In operating the Park, Petitioners missed no opportunity to profit at the expense of their partners. They charged more than $4 million of luxury expenses to the partnership in violation of the partnership agreement; they overcharged the partnership by almost $1.4 million for an obsolete minor attraction that was installed instead

[7] Petitioners' scheme worked: Fund had no viable alternative to signing a new management contract with the Petitioners as high bidder. Pet. App. 25a, 28a. However, one of the express conditions of this new contract was the preservation of Flags' and Funds' claims against Petitioners. Pet. App. 28a; PX 719.

of the EBITDA-boosting Batman ride; and they surreptitiously took a $2.8 million sponsorship fee from Coca-Cola and used it to finance Petitioners' investment in the Six Flags Parks chain, reaping a $26.3 million windfall for Petitioners *from a partnership asset*. Pet. App. 32a, 54a.[8]

Contrary to Petitioners' assertion that their conduct was "barely even tortious" (Pet. 17), the Court of Appeals found it was "especially reprehensible" (Pet. App. 12a) and that Petitioners were "aware" they owed a fiduciary duty to Respondents "but consciously and intentionally disregarded that duty," Pet. App. 55a.

2. This lawsuit was originally filed by Petitioner Six Flags Theme Parks Inc. (a subsidiary of Petitioner Time Warner Entertainment Company, L.P.), and Flag's general partner, Petitioner Six Flags Over Georgia, Inc. Pet. App. 28a. *Petitioners – not Respondents – chose Gwinnett County, Georgia as the forum.* The trial court realigned and added parties. *Ibid.* After a six-week trial, the jury found all four Petitioners liable, awarding $197.3 million in compensatory damages. The jury found by special interrogatory that each Petitioner had acted with "specific intent to harm" and imposed $257 million in punitive damages, a ratio of only 1.3 to 1. Pet. App. 22a & n.3.

In their initial appeal, Petitioners made only a vague and cursory challenge to the constitutionality of the

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[8] Contrary to Petitioners' assertion that "the trial court suppressed evidence that the parties' purpose in entering the partnership was to create a tax shelter" (Pet. 7 n.5), Petitioners "presented their own expert testimony covering those points" and cross-examined Respondents' chief witness about them. Pet. App. 43a-44a. Petitioners also refer to excluded "evidence" that "plainly" shows the Coca-Cola funds were not used to finance the Six Flags acquisition (Pet. 7 n.5), but the Court of Appeals affirmed the exclusion of that alleged proof because Petitioners "plainly" violated a court order to produce the information. Pet. App. 47a.

punitive damages award. Their argument for constitutional excessiveness consumed only two sentences of their 60-page appellate brief. They cited *BMW of N. Am. v. Gore*, 517 U.S. 559 (1996), but solely as limiting the amount of punitive damages in cases involving "purely economic" harm, and *made no mention at all* of *any* of the *BMW* guideposts, even though the third guidepost argument forms the basis for Question 2 of their current Petition in this Court.[9] Resp. App. 14a.

3. The Court of Appeals affirmed. Nearly half of the court's 49-page opinion carefully documented and explained the calculated and outrageous nature of Petitioners' conduct. *See* Pet. App. 21a-34a, 37a-41a, 52a-56a. The Court of Appeals concluded that Petitioners had engaged in "willful misconduct," delineating instances in which Petitioners "took money belonging to [Respondents]," "kept secret profits derived from the sale of a partnership asset," and "engaged in self-dealing conduct that specifically harmed [Respondents]." Pet. App. 55a, 33a. The court also took into account the extremely low ratio – 1.3 to 1 – of punitive to compensatory damages, but explained that it did "not mechanically look to the ratio." Pet. App. 56a.

In its initial opinion, the Court of Appeals said nothing about *BMW's* third guidepost or anything about *BMW* at all. *Ibid.* This is because Petitioners *never asked* that court to perform an analysis under the third or any other guidepost.

The Court of Appeals rejected Petitioners' argument that Georgia law did not recognize a claim for aiding and abetting a breach of fiduciary duty. The Court of Appeals found that Petitioners had "conceded" the existence of "an aiding and abetting theory of liability" by submitting jury

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[9] Petitioners' Reply Brief similarly devoted only two sentences to conceivably federal issues. *See* Resp. App. 16a.

charges on the aiding and abetting theory and by failing properly to enumerate as error on appeal the finding of liability on that ground. Pet. App. 34a-36a. After considering the substance of Petitioners' argument, the court noted that "[w]ere we required to address this issue," it would have affirmed. *Ibid.* Because of Petitioners' failure to comply with state procedural rules, however, the court concluded that it "lacks the jurisdiction to consider" it. Pet. App. 36a.

After affirmance, Petitioners filed a motion for reconsideration with the Court of Appeals, in which they again failed to raise any of the questions presented in their current Petition. With respect to the alleged excessiveness of the punitive damages, Petitioners included only a citation to *BMW* but offered nothing about its potential relevance or its "guideposts." Resp. App. 19a.

4. After the Court of Appeals denied their Motion for Reconsideration, Petitioners sought a discretionary grant of certiorari from the Georgia Supreme Court, which was denied. Pet. 9.

5. Petitioners sought certiorari from this Court and, alternatively, a GVR in light of *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001). On October 1, 2001, this Court granted a GVR in light of *Cooper*. Pet. App. 59a.

6. On remand, the Georgia Court of Appeals asked for re-briefing and re-argument. On March 29, 2002, the whole (ten judge) Court of Appeals unanimously affirmed. The Court held that Petitioners had abandoned their alleged federal constitutional challenges under well-established Georgia law and procedural rules. Nevertheless, the Court of Appeals conducted a thorough *de novo* review under *BMW*. In that review, the Court stated:

> "[A]lthough the harm to Flags and Fund was primarily economic, it was caused by conduct we

> find *especially reprehensible*. Appellants' intentional breach of its fiduciary duty revealed a callous indifference to the financial well-being of its limited partners and their individual investors. *After carefully scrutinizing over 80 volumes of record and transcript* during the first appeal, we found that the evidence adduced supported the jury's conclusion that appellants acted in concert to breach SFOG's fiduciary duty to its business partners. Six-and-a-half pages of our [prior] published opinion are dedicated to describing appellants' scheme to devalue their partners' investment for their own benefit."
>
> * * *
>
> "Appellants' conduct toward its partners and those who invested in the limited partnership was part of a *premeditated plan surreptitiously executed over a period of years*. Appellants' conduct was deceitful, self-serving, and financially damaging. More importantly, however, appellants' conduct was a breach of fiduciary duty, a violation of a confidential relationship of trust requiring the utmost in good faith."
>
> * * *
>
> *"Appellants' conduct was, in short, the kind of behavior we find 'deserving of reproof, rebuke, or censure; blameworthy' – the very definition of 'reprehensible.'"*

Pet. App. 12a-13a (emphasis added).

With respect to Petitioners' belated third guidepost argument, the Court of Appeals identified several Georgia statutes imposing double or treble penalties for "comparable corporate misbehavior." Pet. App. 16a. Because the punitive damages here were only 1.3 times compensatory damages, the court held that those statutes provided "fair notice not only of the kind of conduct that would subject them to punishment, but also of the severity of the penalty that might be imposed." *Ibid.*

Petitioner sought a discretionary grant of certiorari from the Georgia Supreme Court. The Georgia Supreme Court denied the petition, and denied the motion for reconsideration. Pet. App. 17a.

REASONS FOR DENYING THE WRIT

I. PETITIONERS' ABANDONMENT OF THEIR FEDERAL DUE PROCESS CHALLENGE IS AN ADEQUATE AND INDEPENDENT STATE GROUND DEPRIVING THIS COURT OF JURISDICTION

This Court will not review judgments of state courts that rest on adequate and independent state law grounds. *Michigan v. Long*, 463 U.S. 1032, 1040-41 (1983). In this context, an adequate and independent state ground doctrine is jurisdictional, because, if the state law determination is sufficient to sustain the judgment, "any opinion of this Court on the federal question would be purely advisory." *Lambrix v. Singletary*, 520 U.S. 518, 522 (1997).

Thus, where, as here, a state court indicates with "requisite clarity" that petitioner's claims were rejected on state law grounds, this Court will refuse to address the federal claim supposedly raised below. *Sochor v. Florida*, 504 U.S. 527, 533 (1992); *International Longshoremen's Ass'n, AFL-CIO v. Davis*, 476 U.S. 380, 387 (1986). "[R]espect for the independence of state courts, as well as avoidance of rendering advisory opinions, have been the cornerstones of this Court's refusal to decide" such cases. *Michigan v. Long*, 463 U.S. at 1040.

The alternative holding rejecting Petitioners' federal due process claim on the merits does not affect this analysis. "[W]here the judgment of a state court rests upon two grounds, one of which is federal and the other nonfederal in character, [the] jurisdiction [of this Court] fails if the non-federal ground is independent of the federal ground and adequate to support the judgment." *Fox Film Corp. v. Muller*, 296 U.S. 207, 210 (1935).

A. The Abandonment Rule Is Well-Established And Regularly Applied

To preserve a claim of error in the Georgia appellate courts requires two steps: (1) identifying the claim of error in the "Enumeration of Errors" (Rule 27(a)(2)) and (2) providing meaningful argument, supported by legal authority and citation to record evidence, for each enumeration of error. Rule 27(c)(2)-(3). Resp. App. 1a-3a. Petitioners failed on all counts as to any allegation of federal constitutional excessiveness.

Petitioners did not include constitutional excessiveness as an enumeration of error at all, and they devoted only two sentences of a 60 page brief to the issue. Pet. App. 11a-12a.[10] Petitioners' initial appellate brief did not mention, *inter alia*: the first guidepost of *BMW*; the second guidepost of *BMW*; the third guidepost of *BMW*; their new argument that treble damages statutes cannot satisfy the third guidepost; their new argument that alleged infirmities in the compensatory award rendered the punitive award excessive; or their new argument that a comparison to other punitive damages cases was required. Under Rule 27 of the Georgia Court of Appeals, the finding of waiver was not only entirely proper: it was *inescapable*.

Originally adopted in 1965, Court of Appeals Rule 27(c)(2) provides: "Unsupported Claim of Error Treated as Abandoned. Any enumeration of error which is not supported in the brief by citation of authority or argument

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[10] In the Court of Appeals, Petitioners requested, received permission to, and then filed a brief double the 30 page limit. Resp. App. 32a-34a. The only language addressing constitutional issues was: "The punitive damages also violate the Due Process Clauses of the Georgia and United States Constitutions. Resp. App. 14a. As in *BMW of North America, Inc. v. Gore*, 517 U.S. 599 (1996), the injury here 'was purely economic in nature,' and Defendants' conduct 'evinced no indifference to or reckless disregard for the health and safety of others.' *Id.* at 576."

shall be deemed abandoned." Resp. App. 3a. Rule 27(c)(3) provides: "Each enumerated error shall be supported in the brief by specific reference to the record or transcript. In the absence of such reference, the Court will not . . . consider such enumeration." Resp. App. 3a. Numerous Georgia cases have applied Rule 27 and found arguments abandoned because they were not adequately supported in the brief. *See, e.g., Dixon v. MARTA*, 242 Ga. App. 262, 266 (2000) (cited by the Court of Appeals (Pet. App. 12a), "appellate judges should not be expected to take pilgrimages into records in search of error without the compass of citation and argument"); *Harrell v. Bedgood*, 121 Ga. App. 16, 17 (1970) (four sentences in brief insufficient argument to support an enumeration of error); *Mercer v. Woodard*, 166 Ga. App. 119, 129 (1983) (a single sentence of argument is "deficient"); *Taylor v. State*, 177 Ga. App. 624, 628 (1986) (bare citation to a single authority, without meaningful explanation of its relevance or applicability, is not enough to preserve any arguments arising out of that authority); *Haskins v. Jones*, 142 Ga. App. 153, 153 (1977) (holding enumerations of error abandoned for insufficient argument); *Evans v. State*, 159 Ga. App. 706 (1981) (mere statement of defendant's contention not sufficient argument to support enumeration of error); *O'Kelley v. Hayes*, 132 Ga. App. 134 (1974) (same); *McKeever v. State*, 118 Ga. App. 386, 391 (1968) (single sentence insufficient argument to support enumeration, which is deemed abandoned); *Jenkins v. State*, 240 Ga. App. 102, 103 (1999) ("This court requires that appellants support enumerations of error with argument and citations to authority. Mere conclusory statements such as those made here are not the type of meaningful argument contemplated by that rule."); *Williams v. State*, 219 Ga. App. 167, 168 (1995); *Moore v. Winn-Dixie Stores, Inc.*, 214 Ga. App. 157, 158 (1994) ("Any issue reasonably contained within an enumeration of error as to which there has not been any argument or citation of authority made in appellant's brief

is deemed abandoned on appeal.") (citations omitted), *overruled on other grounds, Robinson v. Kroger Co.*, 268 Ga. 735 (1997); *Management by Design, Inc. v. Lakeview Utils., Inc.*, 233 Ga. App. 711 (1998); *Ligon v. Bartis*, 254 Ga. App. 154, *cert. denied*, 123 S. Ct. 702 (2002).

The Georgia Court of Appeals broke no new ground here.

Petitioners argue that the holding of *Kent v. A.O. White, Jr., Consulting Engineers, P.C.* indicates that the waiver rules are not consistently applied. Pet. 16. But the *Kent* case was a short-lived aberration that never reflected or became the law in Georgia. As noted above, numerous pre-*Kent* cases held that a waiver resulted from failure to properly present an argument in a brief. *See supra* at 15-16. *Kent* held (without argument on the issue and without recognizing any of the prior cases), that the defendant would receive a *de novo* review of the *BMW* guideposts despite waiving such review by requesting abuse of discretion review. 253 Ga. App. 492, 498 (2002). When this case appeared before the Court of Appeals the second time, the waiver issue was actually briefed and argued, the prior cases were put before the court, and the nature of a GVR examined. The Court overruled *Kent* and reiterated the long-standing rules of waiver and abandonment in Georgia, from which *Kent* was an unsupported departure. Moreover, Petitioners could not have relied upon *Kent* in "refraining" from raising a federal due process challenge: Petitioners filed the brief in which they abandoned any such arguments on September 20, 1999; *Kent* was not decided until January 29, 2002.

B. Federal Courts Find Waiver Under Similar Facts

Petitioners' claim that their waiver was "imaginary" is also belied by the fact that federal courts find waiver under similar circumstances and rules. In *Coleman v.*

Thompson, 501 U.S. 722, 745-46 (1991), this Court held that where the state procedural rule upon which the waiver of federal claims was predicated had a federal counterpart, "a proper respect for the States required that federal courts give to the state procedural rule the same effect they give to the federal rule." *See also Francis v. Henderson*, 425 U.S. 536, 541-42 (1976) ("There is no reason to . . . give greater preclusive effect to procedural defaults by federal defendants than to similar defaults by state defendants. To hold otherwise would reflect an anomalous and erroneous view of federal-state relations.").

Georgia Court of Appeals Rule 27(c) has a federal counterpart: FRAP 28(a)(9). Resp. App. 3a-4a. Applying that rule, Federal courts regularly refuse to consider issues supported only by cursory argument in a lengthy brief raising numerous issues. *See United States v. Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991) ("A skeletal 'argument,' really nothing more than an assertion, does not preserve a claim. Especially not when the brief presents a passel of other arguments, as Dunkel's did. *Judges are not like pigs, hunting for truffles buried in briefs.*") (emphasis added) (citations omitted); *Greenwood v. FAA*, 28 F.3d 971, 977 (9th Cir. 1994) (in rejecting under Rule 28(a)(9) a claimed constitutional violation, the Ninth Circuit held that "[w]e review only issues which are argued specifically and distinctly in a party's opening brief. We will not manufacture arguments for an appellant, and *a bare assertion does not preserve a claim, particularly when, as here, a host of other issues are presented for review.*") (emphasis added) (citations omitted); *United States v. Zannino*, 895 F.2d 1, 17 (1st Cir. 1990) ("issues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived. . . . It is not enough merely to mention a possible argument in the most skeletal way, leaving the court to do counsel's work. . . . Consequently, a litigant has an obligation to spell out its arguments squarely and distinctly, or else forever hold its

peace"). *See also United States v. Belgarde*, 300 F.3d 1177, 1181 n.1 (9th Cir. 2002) ("[F.R.A.P.] 28(a)(9)(A) requires an appellant to state in his or her argument, 'contentions and the reason for them, with citations to the authorities and parts of the record on which the appellant relies.' Belgarde did not do this . . . and as such abandoned any such issue on appeal.").

C. Petitioners Misstate The Holdings Of The Court Of Appeals And The Arguments Of The Parties

Petitioners apparently recognize that the authorities cited above deprive this Court of jurisdiction and doom their challenge to the Court of Appeals abandonment holding. Straining to escape that ruling, Petitioners contend that the unanimous Court of Appeals and the Georgia Supreme Court concocted an "entirely imaginary" waiver as a "pretext" to express "defiance" and "antagonism" towards this Court and its GVR order, "denounced" this Court, and refused to act in "good faith." Pet. 2, 3, 13, 17, 21. Petitioners misstate the holding of the Court of Appeals, clear Georgia law, and the arguments of the parties.

Petitioners assert that the Court of Appeals "defied this Court's directives" and "*refused* to conduct the *de novo* review required by federal law and dictated by this Court's GVR." Pet. at 13 (emphasis added). But, after finding that the federal due process challenge had not been preserved under Georgia's appellate rules, the Court of Appeals went on to review the punitive damages award *de novo* and apply the *Gore* guideposts. Pet. App. 12a. The multi-page, detailed *de novo* review that followed culminated in this finding: "[a]pplying a *de novo* standard of review and weighing the *Gore* guideposts, we find that the award of punitive damages under these circumstances does not violate appellants' federal due process rights." Pet. App.

16a. The Court of Appeals expressly performed the very analysis that Petitioners claim it "defiantly" refused to undertake.

To fuel this image of the "defiant" Georgia courts, Petitioners claim that the Court of Appeals "denounced this Court's punitive damages jurisprudence" and criticized it as a "'dangerous development'" and as "an imperfect . . . attempt to evaluate punitive damages." Pet. 2, 13. That language, however, came not from the Court of Appeals itself, but instead from law review articles it cited (Pet. App. 8a, 10a-11a n.6) as part of its balanced, scholarly analysis (Pet. App. 6a-10a) of whether the Georgia Supreme Court would use *Cooper's de novo* standard of review in evaluating claims of excessiveness of punitive damages under Georgia common law. For the federal Constitutional analysis, however, the Court of Appeals faithfully followed *BMW* and *Cooper*. Pet. App. 12a-16a.

To support their contention that the waiver was "entirely imaginary" (Pet. 13), Petitioners erroneously claim that, in the previous appearance of this case in this Court, Respondents asserted only a waiver argument "different than that embraced by the court of appeals." Pet. 15 n.9. That is also incorrect. At that stage, Respondents argued that no federal constitutional issue was preserved (*see, e.g.*, Resp. App. 21a-22a) (petitioners' arguments below were "inadequate to constitute the proper presentation of any federal constitutional concerns they might have had. . . . "). Respondents also argued that "[i]n their briefs in that court . . . Petitioners made only vague challenges to the punitive damages award . . . [and] included only two sentences alleging any due process violations. . . . In reference to the alleged excessiveness of the punitive damages, Petitioners included only a naked citation to *BMW* but offered no discussion of its potential relevance." Resp. App. 21a-22a. Those are *exactly* the fatal failures upon which the Court of Appeals based the waiver holding

that now controls this Court's disposition of this case. Pet. App. 11a-12a.

Using ellipses to alter the meaning of a quote, Petitioners assert that Respondents *conceded* "the proper presentation of some due process claims under *BMW*." Pet. 15, *quoting* 2001 Resp. at 18. There was no such concession. After arguing that *no BMW* claims were preserved (2001 Resp. at 7, 9, 27, Resp. App. 21a-22a), Respondents focused in on the alternative argument: "Nor could the proper presentation of *some* due process claims under *BMW* adequately preserve separate ones." 2001 Resp. at 18 (emphasis in original). Resp. App. 22a.

Petitioners incorrectly assert that "even in opposing petitioners' certiorari petition in the Georgia Supreme Court, respondents could not bring themselves to defend the court of appeals' waiver holding." Pet. 15. To the contrary, Respondents argued to the Georgia Supreme Court that "[t]he Court of Appeals' findings on these issues are unassailable." Resp. App. 24a. Respondents emphasized that the abandonment holding "relies on settled principles of Georgia law," and was "neither novel nor certworthy." Resp. App. 25a-26a. And Respondents argued that "the whole court's ruling also reaffirmed the longstanding rule under Georgia law that an argument not made in an appellant's brief is abandoned and is not preserved for review." Resp. App. 28a.

Absurdly, Petitioners argue that the Court of Appeals did not find a waiver of the *BMW* claim in the case's first appearance before that Court. Pet. 14-15. But the Court of Appeals did not then rule on or find a waiver of the *BMW* challenge *because* Petitioners had not yet raised the issue. Pet. App. 56a. "This Court has frequently stated that when 'the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the

contrary.'" *Webb v. Webb*, 451 U.S. 493, 495 (1981) (quoting *Street v. New York*, 394 U.S. 576, 582 (1969)).

Petitioners argue that the waiver holding was suspect because the Court of Appeals did not hold the state common law excessiveness claim to be waived. Pet. 15-16. The answer: Petitioners *enumerated* common law excessiveness as error *and* devoted pages of their initial brief to common law excessiveness, in stark contrast to the two throw-away sentences arguably devoted to federal constitutional excessiveness. Resp. App. 14a.

Petitioners argue that this Court's GVR holding "*implied* a determination that petitioners' *BMW* claims . . . were properly preserved." Pet. at 16. That is not the law.[11] Proper preservation under rules of the Court of Appeals of Georgia is a matter of Georgia law. Even if this Court had *expressly* held that such claims were properly preserved under Georgia procedural rules (which it did not), the Georgia courts would remain free to disagree as to this matter of state law after remand. *See Georgia Ry. & Elec. Co. v. Decatur*, 297 U.S. 620 (1936); *Indiana ex rel. Anderson v. Brand*, 303 U.S. 95, 109 (1938); *Orr v. Orr*, 440 U.S. 268, 284 n.13 (1979).

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[11] *See Fontroy v. Owens*, 23 F.3d 63, 66 (3d Cir. 1994) (GVR in light of intervening Supreme Court case was not a decision on the contention that the petitioner had waived the issue governed by that case, and GVR could not be construed as "deciding the waiver issue."); *Varner v. Illinois State Univ.*, 226 F.3d 927, 936-37 (7th Cir. 2000) (although case was remanded for consideration of new Supreme Court authority, nothing in GVR order precluded court on remand from concluding defendant had waived that argument), *cert. denied*, 533 U.S. 902 (2001). This Court has held that, upon remand, appellate courts "remain free" to base their decisions on independent state law grounds. *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 10 n.5 (1990). *See Immuno, AG v. Moor-Jankowski*, 77 N.Y.2d 235, 251-52 (after GVR, court must *consider* intervening authority, but may base its decision upon independent state law grounds), *cert. denied*, 500 U.S. 954 (1991).

II. THE COURT OF APPEALS CONDUCTED A PROPER *DE NOVO* REVIEW UNDER *BMW*

Despite finding abandonment, the Court of Appeals alternatively performed a thorough *de novo* review under *BMW*, properly applying each guidepost.

The First Guidepost. Petitioners briefly assert (one paragraph) that their conduct was not "reprehensible" under the first *BMW* guidepost. Pet. 17-18. This contention is misplaced in an intentional tort case in which the jury found by special interrogatory that each Petitioner acted with "a specific intent to harm." Pet. App. 22a n.3. The Court of Appeals' painstaking review of the record and the multiple, intentional bad acts and schemes supporting its conclusion that the conduct of the Petitioners was "especially reprehensible" (Pet. App. 12a), are discussed in detail at pp. 3, 5-12, *supra*.

Petitioners' claim that the corporate "parents" had no notice that they could be liable for aiding and abetting their subsidiaries in a tortious scheme (Pet. 18-19) to divert hundreds of millions of dollars to the "parent" corporations is particularly specious.[12] The evidence showed that the directions to "take money belonging to" Respondents came from the "parent" corporations, the money went to the "parent" corporations, Pet. App. 24a, 25a, 28a, and the "parent" corporations *admitted* they "knew they had a duty to maximize the performance of the partnership parks". Pet. App. 40a, 24a. The Restatement

[12] In addition, Petitioners' notice claim is independently barred by their waiver at trial of any objection to aiding-and-abetting liability. As the Court of Appeals held, Petitioners waived this issue under state law in two ways: by failing to object at trial to the submission of this case to the jury on a theory of aiding-and-abetting liability (and in fact submitting their own charges on that theory), and by failing to "enumerate[ ] as error the jury's finding of liability on this theory." Pet. App. 34a-36a.

(Second) Torts § 874, comment c, provides for liability for aiding a breach of fiduciary duty. A Georgia statute gave notice that "in *all* cases" one who procures the commission of an actionable wrong "is a joint wrongdoer and may be subject to an action either alone or jointly with the person who actually committed the injury." O.C.G.A. § 51-12-30 (emphasis added). Resp. App. 4a. Moreover, several published Georgia cases had *imposed* liability for aiding and abetting a breach of fiduciary duty prior to this case, but simply had not stated in so many words that Georgia recognizes this tort.[13] "It is bedrock law that the conduct of one who knowingly joins with a fiduciary . . . in breaching a fiduciary duty, is equally culpable." *Mills Acquisition Co. v. MacMillan, Inc.*, Del. Supr., 559 A.2d 1261, 1284 n.33 (1989). But even beyond that, the "parents" cannot reasonably have believed that they were immune from liability for directing their subsidiaries to breach fiduciary duties where the parents enjoyed the proceeds of the misconduct.

The Second Guidepost. Petitioners' second guidepost argument rests on the claim that the compensatory award was, itself, excessive and thus was punitive rather than "compensatory." Thus, Petitioners claim, the allowable

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[13] *Williams v. Service Corp. Int'l*, 218 Ga. App. 10, 459 S.E.2d 621 (1995) (denial of motion to dismiss claims for aiding and abetting torts including breach of fiduciary duty affirmed); *Gaines v. Crompton & Knowles Corp.*, 190 Ga. App. 863 (1989) (jury award of resulting profits of entity that aided breach of fiduciary duty authorized under Georgia law); *Arford v. Blalock*, 199 Ga. App. 434 (1991) (party who *induced* fiduciary to breach fiduciary duty liable for punitive damages). *See Loyola Fed. Sav. Bank v. Fickling*, 58 F.3d 603, 608 (11th Cir. 1995) (affirming verdict under Georgia law for assisting general partner's breach of fiduciary duty to limited partner); *Loyola Fed. Sav. & Loan Ass'n v. Fickling*, 783 F. Supp. 620, 625-26 & n.2 (M.D.Ga. 1992) (denying summary judgment on claim of assisting breach of fiduciary duty under Georgia law).

punitive damages ratio should be "lower." (Pet. 19-20). But the affirmed compensatory award, now paid by Petitioners and not subject to challenge in this Court, was, as found by the Court of Appeals, "well within the range of evidence" and calculated to a "reasonable certainty." Pet. App. 54a. Accordingly, the entitlement of Respondents to that amount *as* compensatory damages has been conclusively established, and the factual predicate to the argument therefore fails. Moreover, whatever the validity of Petitioners' argument in the abstract, it is moot here because the 1.3 to 1 ratio is already far "lower" than that allowed by many decisions of this and other Courts. *See Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991) (punitive damages four times compensatory damages within constitutional boundaries).

The Third Guidepost. Petitioners' substantive arguments under the third guidepost also have no merit. In *BMW*, this Court set forth as its third guidepost "[c]omparing the punitive damages award and the civil or criminal penalties that could be imposed for comparable misconduct." 517 U.S. at 583. The Court of Appeals found Petitioner's conduct to be comparable to conduct that violates several Georgia statutes, including the Georgia RICO statute. Pet. App. 15a-16a. Each of the statutes punishing comparable conduct provides for either double or treble the compensatory damages as a penalty (and some also call for jail time). *Id.* Because the ratio here was 1.3 to 1, the Court of Appeals properly held that these statutory penalties, provided for comparable misconduct, satisfied the third guidepost. *Id.*

A. The Use Of Treble Damages Statutes For The Third Guidepost Analysis Is Proper

Petitioners' entirely new and unsupported argument that treble damages statutes cannot satisfy the third guidepost of *BMW* (Pet. 23) is contrary to existing authority. *See*,

e.g., *EEOC v. CEC Entertainment, Inc.*, No. 98-C-698-X, 2000 U.S. Dist. LEXIS 13934, at *52 (W.D. Wisc. 2000) (performing *BMW* analysis and upholding three to one ratio, noting that "'statutes routinely provide for double and treble damages awards to deter and punish.' For instance, the ADEA provides for double damages in cases of willful violations."); *EEOC v. AIC Sec. Investigations*, 55 F.3d 1276, 1287 (7th Cir. 1995) (punitive damages not excessive where "award is three times the amount of compensatory damages, and statutes routinely provide for double and treble damages awards to deter and punish."); *Pioneer Commer. Funding Corp. v. Am. Fin. Mortg. Corp.*, 50 Pa. D & C 4th 31, 69 (2000) (looking to analogous treble damages statute under third guidepost, and remitting punitive damages to 3:1).[14] *See also St. John v. Coisman*, 799 So. 2d 1110, 1122-23 (Fla. Dist. Ct. App. 2001).

Indeed, the very concept of a proportionality/ratio requirement had its "pedigree" in the long acceptance of treble damages awards. *BMW*, 517 U.S. at 580-81. As this Court noted in another punitive damages case, "[a]wards of double or treble damages authorized by statute date back to the 13th century." *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. 257, 274 (1989). In keeping with this ancient tradition, many state and federal statutes set the penalty as "treble" the amount stolen or damages caused as punishment and to deter misconduct. *See Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 639 (1981) ("The very idea of treble damages reveals an intent

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[14] *See also Clark v. MetroHealth Found., Inc.*, 90 F. Supp. 2d 976, 986 (N.D. Ind. 2000) (punitive damages ratio of 3:1 or less reasonable "nearly as a matter of law" given prevalence of treble damages awards); *David v. Caterpillar, Inc.*, 185 F. Supp. 2d 918 (C.D. Ill. 2002) (where conduct was not particularly reprehensible, ratio would be reduced to 3:1 in light of discussion in *BMW* about long-time acceptance of treble damages).

to punish past, and to deter future, unlawful conduct, not to ameliorate the liability of wrongdoers.") This Court has never held that trebling of large compensatory awards implicated due process, and in fact recently denied certiorari in a treble damages case where the compensatory damages were $350 million and the total award exceeded $1 billion. *United States Tobacco Co. v. Conwood Co.*, Docket No. 02-603 (certiorari denied, January 13, 2003).[15] Based on this history, the use of treble damages statutes to satisfy the notice requirement of *BMW* is entirely appropriate, particularly where, as here, the appellate court looks to treble damages statutes governing "comparable" misconduct.[16] Indeed, if treble damages statutes did not

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[15] Notice of the potential ratio to the damages caused is sufficient notice to satisfy due process no matter how large the damages trebled. *See, e.g., United States v. Citrin*, 972 F.2d 1044, 1051 (9th Cir. 1992) (treble damages provision does not provide for penalty "disproportioned to the offense" and thus does not violate due process); *Dowell v. Department of Veterans' Affairs*, No. 3:95-CV-606-S, 1997 U.S. Dist. LEXIS 22777, at *8 (W.D.Ky. May 6, 1997) ("due process rights are not offended by the existence of a treble damages provision."); *Blane v. American Inventors Corp.*, 934 F. Supp. 903, 910 (M.D.Tenn. 1996) ("the Act's treble damages provision does not violate Defendants' due process rights."); *Jeppsen v. Piper, Jaffray & Hopwood*, 879 F. Supp. 1130, 1138 (D.Utah 1995) (award of treble damages with no review for excessiveness does not violate due process); *In re Air Crash Disaster at Stapleton Int'l Airport, Denver, Colo., on November 15, 1987*, 720 F. Supp. 1505, 1518 (D.Col. 1989) (because it is proportional to actual damages, trebling does not present the due process concerns of punitive damages awards), *rev'd in part on other grounds*, 964 F.2d 1059 (10th Cir. 1992); *United States v. Hugelmeyer*, 774 F. Supp. 559, 562 (D.Ariz. 1991) (treble damages do not violate due process even where amount to be trebled is a "relatively large sum of money" – contrary argument is "illogical").

[16] Petitioners' argument that the statutes are not "comparable" would turn this Court into an arbiter of what is "comparable" under state law. *See BMW*, 517 U.S. at 577 ("only state courts may authoritatively construe state statutes."). The Court of Appeals correctly and specifically found that Petitioners "took money belonging to [appellees]."

(Continued on following page)

provide constitutionally sufficient notice of liability up to three times the actual damages, then all treble damages statutes would be unconstitutional.

Petitioners then argue that insufficient notice is provided by treble damages statutes "when applicable law does not limit compensatory damages to foreseeable injury." Pet. 23. That argument was never raised, even in Petitioners' briefing and argument on remand, and has not been preserved. That argument is also inconsistent with the holding of the Court of Appeals that the "evidence was sufficient to allow the jury to calculate damages to Fund caused by appellants with reasonable certainty." Pet. App. 54a. Moreover, the damages *were clearly "foreseeable"* – in fact, they were exactly what Petitioners intended when they acted with "specific intent to harm" (Pet. 22a) and implemented their "premeditated plan surreptitiously executed over a period of years" to "depress the value of their [partners'] investment" for Petitioners' own financial benefit, conduct the Court of Appeals found "especially reprehensible". Pet. App. 12a, 13a.

Pet. 55a. This is plainly comparable to theft. In Georgia, "[t]heft by taking in breach of a fiduciary obligation is a felony offense." *Hanson v. State*, 232 Ga. App. 352, 354 (1998); *see* O.C.G.A. §§ 16-8-2, -3. Resp. App. 4a-5a. As such, it is a serious crime, punishable by a 15-year prison term. *See* O.C.G.A. § 16-8-12(a)(2). Resp. App. 6a. Petitioners committed more than two acts of theft against both Flags and Fund, meaning that their conduct could fall under Georgia's RICO statute. *See* O.C.G.A. §§ 16-14-1 *et seq*. Resp. App. 9a. Accordingly, their conduct could trigger a prison term of up to 20 years and/or a fine as large as *three times* their pecuniary gain. *See* O.C.G.A. § 16-14-5. Resp. App. 9a The civil penalty for a RICO violation includes treble damages. *See* O.C.G.A. § 16-14-6(c). Resp. App. 11a. The Court of Appeals correctly analogized to these statutes.

B. The Court Of Appeals Was Not Required To Compare This Case To Other Punitive Verdicts Where Statutes Satisfied The Third Guidepost

Petitioners next argue that the Court of Appeals erred in not comparing this award to supposedly analogous punitive damages cases under the third guidepost. Pet. 24.[17] Petitioners do not explain why the third guidepost, which calls for a comparison to "civil or criminal penalties that could be imposed for comparable misconduct", cannot be satisfied by comparison statutory penalties, rather than past jury awards. Statutes (and no cases) were all this Court examined in the third guidepost portions of *BMW*, 517 U.S. at 583-86, and *Cooper*, 532 U.S. at 442. Lower courts were directed to give "substantial deference" to "*legislative pronouncements*" in a third guidepost analysis. *BMW*, 517 U.S. at 583. But in any event, such a review would not have assisted Petitioners, since a comparison to Georgia cases would still compel affirmance.[18]

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[17] Petitioners' claim that the Court of Appeals held it need not examine other cases on the third guidepost (Pet. 24) misconstrues the holding. The Court was specifically following *BMW*, Pet. App. 14a n.9 (*citing BMW [Gore]*, 517 U.S. at 580-83), and discussing the second, and not the third guidepost.

[18] The Georgia Courts have repeatedly affirmed punitive damages awards in breach of fiduciary duty cases with a much higher ratio to the compensatory award than the 1.3 to 1 ratio here. *See Byrne v. Reardon*, 196 Ga. App. 735 (1990) (ratio of 100:1 affirmed in breach of fiduciary duty case); *Arford v. Blalock*, 199 Ga. App. 434 (1991) (party who *induced* fiduciary to breach duty liable for punitive damages: 5:1 ratio approved and verdict reinstated); *Elliott v. McDaniel*, 224 Ga. App. 848 (1996), *rev'd on other grounds*, 269 Ga. 262 (1998) (punitive damages with 10:1 ratio affirmed in breach of fiduciary duty and misappropriation of corporate opportunity case); *E.F. Hutton & Co. v. Weeks*, 166 Ga. App. 443 (1983) (punitive damages with 2.2:1 ratio affirmed in breach of fiduciary duty case).

As this Court held in *Haslip,* 499 U.S. at 23-24, a 4:1 compensatory-to-punitive ratio does not "cross the line into the area of constitutional impropriety." Based upon *Haslip*, Petitioners certainly were on notice that punitive damages of up to four times the harm they intentionally inflicted on their partners could be the result of their intentional torts.

III. THE REQUEST FOR GVR IN LIGHT OF *STATE FARM* IS MERITLESS

Petitioners request a GVR in light of *State Farm Mutual Automobile Insurance Co. v. Campbell*, Docket No. 01-1289 ("*Campbell*") in which argument was heard on December 9, 2002. Even if Petitioner had not abandoned all federal constitutional challenges to the award, there would still be no basis for another GVR in this case.

In *Campbell*, the Utah Supreme Court affirmed a verdict for $145 million in punitive damages, based on a compensatory damages award of $911.25 in pecuniary damages and $1,000,000 in general (emotional) damages – a ratio of 145:1 between punitive damages and total compensatory damages.

This ratio makes *Campbell* irrelevant to this case and its 1.3 to 1 ratio. Even if this Court were to adopt the 5:1 "cap" on the ratio of punitive to compensatory damages suggested by the petitioner in *Campbell* at oral argument, it would not impact this case.

Further, as Petitioners concede, the present case does not contain the "extraterritoriality" issue which is the focal point of *Campbell*. Pet. 25. In fact, here the jury was *expressly* instructed *not* to award punitive damages for extraterritorial acts: "punitive damages . . . are awarded . . . solely . . . for conduct which causes harm or threatens to cause harm to the rights of persons *within the State of*

Georgia." Resp. App. 33a (emphasis added). There is no basis to GVR this case again.

CONCLUSION

Allegations that the appellate courts of a state have deliberately refused to carry out the mandate of this Court are serious matters. *See Cooper v. Aaron*, 358 U.S. 1 (1958). Incorrect allegations of such misbehavior should never be advanced. The courts of Georgia have faithfully applied relevant federal law to this case and the resulting judgment raises no issue worthy of this Court's review. The Petition should be denied.

Respectfully submitted,

JAMES E. BUTLER, JR.
GEORGE W. FRYHOFER III
BUTLER, WOOTEN, FRYHOFER, DAUGHTERY,& SULLIVAN
2719 Buford Highway
Atlanta, Georgia 30324
(404) 321-1700

GERALD DAVIDSON, JR.
DAVIDSON & TUCKER, LLC
6700 Sugarloaf Parkway
Suite 500
Duluth, Georgia 30097
(678) 775-6853

EMMET J. BONDURANT II
Counsel of Record
H. LAMAR MIXSON
MICHAEL B. TERRY
JOSHUA F. THORPE
BONDURANT, MIXSON & ELMORE, LLP
3900 One Atlantic Center
1201 W. Peachtree St., NW
Atlanta, Georgia 30309
(404) 881-4100

February 12, 2003

Counsel for Respondents

RESPONDENTS' APPENDICES

APPENDIX A

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

UNITED STATES CODE
Title 28 – Judiciary and Judicial Procedure
Part IV – Jurisdiction and Venue
Chapter 81 – Supreme Court

* * *

§ 1257. State courts; certiorari

(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

RULES OF THE COURT OF APPEALS OF THE STATE OF GEORGIA

Rule 27. Structure and Content.

(a) **Appellant**. – The brief of appellant shall consist of three parts:

1. Part One shall contain a succinct and accurate statement of the proceedings below and the material facts relevant to the appeal and the citation of such parts

of the record or transcript essential to a consideration of the errors complained of, and a statement of the method by which each enumeration of error was preserved for consideration. Record and transcript citations must be to the volume or part of the record or transcript and the page numbers that appear on the appellate records or transcript as sent from the court below.

2. Part Two shall consist of the enumeration of errors.

3. Part Three shall contain the argument and citation of authorities. It shall also include a concise statement of the applicable standard of review with supporting authority for each issue presented in the brief.

(b) **Appellee.** – The brief of appellee shall be divided in the following manner:

1. Part One shall point out any material inaccuracy or incompleteness of appellant's statement of facts and any additional statement of facts deemed necessary, plus such additional parts of the record or transcript deemed material. Failure to do so shall constitute consent to a decision based on the appellant's statement of facts. Except as controverted, appellant's statement of facts may be accepted by this Court as true.

2. Part Two shall contain appellee's argument and the citation of authorities as to each enumeration of error. It shall also include the standard of review if different from that contended by the appellant.

(c) **General Provisions.** – 1. Sequence of Argument. The sequence of arguments in the briefs shall follow the

order of the enumeration of errors, and shall be numbered accordingly.

2. Unsupported Claim of Error Treated as Abandoned. Any enumeration of error which is not supported in the brief by citation of authority or argument may be deemed abandoned.

3. References to Record or Transcript. i. Each enumerated error shall be supported in the brief by specific reference to the record or transcript. In the absence of such reference, the Court will not search for or consider such enumeration.

ii. A contention that certain matters are not supported by the record may be answered by reference to particular pages where they appear.

iii. Reference to the record should be indicated by specific volume or part of the record and by (R-Page Number of the Record). Reference to the transcript should be indicated by specific volume or part of the transcript and by (T-Page Number of the Transcript). Reference to a motion transcript should be indicated by (MT-Page Number of the Transcript and date of the hearing).

iv. No briefs or motions shall be filed under seal unless counsel has moved the Court for permission to file under seal and the Court has granted such motion.

FEDERAL RULES OF APPELLATE PROCEDURE

Rule 28. Briefs

(a) **Appellant's Brief**. The appellant's brief must contain, under appropriate headings and in the order indicated:

* * *

(9) the argument, which must contain:

(A) appellant's contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies; and

(B) for each issue, a concise statement of the applicable standard of review (which may appear in the discussion of the issue or under a separate heading placed before the discussion of the issue);

OFFICIAL CODE OF GEORGIA

* * *

§ 51-12-30. Procurer of wrong is joint wrongdoer.

In all cases, a person who maliciously procures an injury to be done to another, whether an actionable wrong or a breach of contract, is a joint wrongdoer and may be subject to an action either alone or jointly with the person who actually committed the injury.

* * *

§ 16-8-2. Theft by taking.

A person commits the offence of theft by taking when he unlawfully takes or, being in lawful possession thereof,

unlawfully appropriates any property of another with the intention of depriving him of the property, regardless of the manner in which the property is taken or appropriated.

---

§ 16-8-3. Theft by deception.

(a) A Person commits the offense of theft by deception when he obtains property by any deceitful means or artful practice with the intention of depriving the owner of the property.

(b) A person deceives if he intentionally:

(1) Creates or confirms another's impression of an existing fact or past event which is false and which the accused knows or believes to be false;

(2) Fails to correct a false impression of an existing fact or past event which he has previously created or confirmed;

(3) Prevents another from acquiring information pertinent to the disposition of the property involved;

(4) Sells or otherwise transfers or encumbers property intentionally failing to disclose a substantial and valid known lien, adverse claim, or other legal impediment to the enjoyment of the property, whether such impediment is or is not a matter of official record; or

(5) Promises performance of services which he does not intend to perform or knows will not be performed. Evidence of failure to perform standing alone shall not be sufficient to authorize a conviction under this subsection.

(c) "Deceitful means" and "artful practice" do not, however, include falsity as to matters having no pecuniary significance, or exaggeration by statements unlikely to deceive ordinary persons in the group addressed.

* * *

---

§ 16-8-12. Punishment.

(a) A person convicted of a violation of Code Sections 16-8-2 to 16-8-9 shall be punished as for a misdemeanor except:

(1) If the property which was the subject of the theft exceeded $500.00 in value, by imprisonment for not less than one nor more than ten years or, in the discretion of the trial judge, as for a misdemeanor;

(2) If the property was taken by a fiduciary in breach of a fiduciary obligation or by an officer or employee of a government or a financial institution in breach of his or her duties as such officer or employee, by imprisonment for not less than one nor more than 15 years, a fine not to exceed the amount provided by Code Section 17-10-8, or both;

(3) If the crime committed was a violation of Code Section 16-8-2 and if the property which was the subject of the theft was a memorial to the dead or any ornamentation, flower, tree, or shrub placed on, adjacent to, or within any enclosure of a memorial to the dead, by imprisonment for not less than one nor more than three years. Nothing in this paragraph shall be construed as to cause action taken by a cemetery, cemetery owner, lessee, trustee, church, religious or fraternal organization,

corporation, civic organization, or club legitimately attempting to clean, maintain, care for, upgrade, or beautify a grave, gravesite, tomb, monument, gravestone, or other structure or thing placed or designed for a memorial of the dead to be a criminal act;

(4) (A) The provisions of paragraph (1) of this subsection notwithstanding, if the property which was the subject of the theft was a motor vehicle or was a motor vehicle part or component which exceeded $100.00 in value or if the theft or unlawful activity was committed in violation of subsection (b) of Code Section 10-1-393.5 or in violation of subsection (b) of Code Section 10-1-393.6 or while engaged in telemarketing conduct in violation of Chapter 5B of Title 10, by imprisonment for not less than one nor more than ten years or, in the discretion of the trial judge, as for a misdemeanor; provided, however, that any person who is convicted of a second or subsequent offense under this paragraph shall be punished by imprisonment for not less than one year nor more than 20 years.

(B) Subsequent offenses committed under this paragraph, including those which may have been committed after prior felony convictions unrelated to this paragraph, shall be punished as provided in Code Section 17-10-7;

(5) (A) As used in this paragraph, the term:

(i) "Destructive device" means a destructive device as such term is defined by Code Section 16-7-80.

(ii) "Explosive" means an explosive as such term is defined by Code Section 16-7-80.

(iii) "Firearm" means any rifle, shotgun, pistol, or similar device which propels a projectile or projectiles through the energy of an explosive.

(B) If the property which was the subject of the theft offense was a destructive device, explosive, or firearm, by imprisonment for not less than one nor more than ten years; or

(6) If the property which was the subject of the theft is a grave marker, monument, or memorial to one or more deceased persons who served in the military service of this state, the United States of America or any of the states thereof, or the Confederate States of America or any of the states thereof, or a monument, plaque, marker, or memorial which is dedicated to, honors, or recounts the military service of any past or present military personnel of this state, the United States of America or any of the states thereof, or the Confederate States of America or any of the states thereof, and if such grave marker, monument, memorial, plaque, or marker is privately owned or located on privately owned land, by imprisonment for not less than one nor more than three years if the value of the property which was the subject of the theft is $300.00 or less, and by imprisonment for not less than three years and not more than five years if the value of the property which was the subject of the theft is more than $300.00.

(b) Except as otherwise provided in paragraph (4) of subsection (a) of this Code section, any person who commits the offense of theft by deception when the property which was the subject of the theft exceeded $500.00 in value and the offense was committed against a person who is 65 years of age or older shall, upon conviction thereof, be

punished by imprisonment for not less than five nor more than ten years.

(c) Where a violation of Code Section 16-8-2 to 16-8-9 involves the theft of a growing or otherwise unharvested commercial agricultural product which is being grown or produced as a crop, such offense shall be punished by a fine of not less than $500.00 and not more than the maximum fine otherwise authorized by law. This minimum fine shall not in any such case be subject to suspension, stay, or probation. This minimum fine shall not be required in any case in which a sentence of confinement is imposed and such sentence of confinement is not suspended, stayed, or probated; but this subsection shall not prohibit imposition of any otherwise authorized fine in such a case.

* * *

---

§ 16-4-1. Short title.

This chapter shall be known and may be cited as the "Georgia RICO (Racketeer Influenced and Corrupt Organizations) Act."

* * *

---

§ 16-14-5. Criminal penalties and alternative fine.

(a) Any person convicted of the offense of engaging in activity in violation of Code Section 16-14-4 is guilty of a felony and shall be punished by not less than five nor more than 20 years' imprisonment or the fine specified in subsection (b) of this Code section, or both.

(b) In lieu of any fine otherwise authorized by law, any person convicted of the offense of engaging in conduct in violation of Code Section 16-14-4 may be sentenced to pay a fine that does not exceed the greater of $25,000.00 or three times the amount of any pecuniary value gained by him from such violation.

(c) The court shall hold a hearing to determine the amount of the fine authorized by subsection (b) of this Code section.

(d) For the purposes of subsection (b) of this Code section, "pecuniary value" means:

(1) Anything of value in the form of money, a negotiable instrument, a commercial interest, or anything else, the primary significance of which is economic advantage; or

(2) Any other property or service that has a value in excess of $100.00.

---

§ 16-14-6. Other civil remedies.

(a) Any superior court may, after making due provisions for the rights of innocent persons, enjoin violations of Code Section 16-14-4 by issuing appropriate orders and judgments including, but not limited to:

(1) Ordering any defendant to divest himself of any interest in any enterprise, real property, or personal property;

(2) Imposing reasonable restrictions upon the future activities or investments of any defendant including,

but not limited to, prohibiting any defendant from engaging in the same type of endeavor as the enterprise in which he was engaged in violation of Code Section 16-14-4;

(3) Ordering the dissolution or reorganization of any enterprise;

(4) Ordering the suspension or revocation of any license, permit, or prior approval granted to any enterprise by any agency of the state; or

(5) Ordering the forfeiture of the charter of a corporation organized under the laws of this state or the revocation of a certificate authorizing a foreign corporation to conduct business within this state upon a finding that the board of directors or a managerial agent acting on behalf of the corporation, in conducting affairs of the corporation, has authorized or engaged in conduct in violation of Code Section 16-14-4 and that, for the prevention of future criminal activity, the public interest requires that the charter of the corporation be forfeited and that the corporation be dissolved or the certificate be revoked.

(b) Any aggrieved person or the state may institute a proceeding under subsection (a) of this Code section. In such proceeding, relief shall be granted in conformity with the principles that govern the granting of injunctive relief from threatened loss or damage in other civil cases, provided that no showing of special or irreparable damage to the person shall have to be made. Upon the execution of proper bond against damages for an injunction improvidently granted and a showing of immediate danger of significant loss or damage, a temporary restraining order and a preliminary injunction may be issued in any such action before a final determination on the merits.

(c) Any person who is injured by reason of any violation of Code Section 16-14-4 shall have a cause of action for three times the actual damages sustained and, where appropriate, punitive damages. Such person shall also recover attorneys' fees in the trial and appellate courts and costs of investigation and litigation reasonably incurred. The defendant or any injured person may demand a trial by jury in any civil action brought pursuant to this Code section.

(d) Any injured person shall have a right or claim to forfeited property or to the proceeds derived therefrom superior to any right or claim the state or the county (other than for costs) has in the same property or proceeds. To enforce such a claim, the injured person must intervene in the forfeiture proceeding prior to is final disposition.

(e) A conviction in any criminal proceeding under this chapter shall estop the defendant in any subsequent civil action or proceeding as to all matters proved in the criminal proceeding.

APPENDIX B

IN THE COURT OF APPEALS

STATE OF GEORGIA

TIME WARNER ENTERTAINMENT COMPANY, L.P.,
SIX FLAGS ENTERTAINMENT CORPORATION,
SIX FLAGS THEME PARKS INC., and
SIX FLAGS OVER GEORGIA, INC.,

Appellants/Defendants,

-against-

SIX FLAGS OVER GEORGIA, LLC, SIX FLAGS FUND, LTD. (L.P.), and GEORGE DEROY, as Trustee of the Six Flags Claims Trust,

Appellees/Plaintiffs.

Appeal No. A00A0120

BRIEF OF APPELLANTS

[September 20, 1999]

Walt M. Britt
Georgia Bar No. 083237
Chandler & Britt, LLC
4350 South Lee Street
Buford, GA 30518
(770) 271-2991

Evan R. Chesler
Keith R. Hummel
Cravath, Swaine & Moore
Worldwide Plaza
825 Eighth Avenue
New York, NY 10019-7475
(212) 474-1000

Attorneys for Appellants
Time Warner Entertainment
Company, L.P., Six Flags
Entertainment Corporation,
Six Flags Theme Parks Inc.,
and Six Flags Over Georgia, Inc.

* * *

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This award violates the Excessive Fines Clause of the Georgia Constitution because, as in *Colonial Pipeline Co. v. Brown*, 258 Ga. 115, 365 S.E.2d 827 (1988),

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there is no "sensible relation between punishment and offense". *Id.* at 119-20, 365 S.E.2d at 831. Notably, Defendants' conduct involved no "personal injury or death" (or even a *risk* of injury or death). *Id.* at 122, 365 S.E.2d at 833. The punitive damages also violate the Due Process Clauses of the Georgia and United States Constitutions. As in *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), the injury here "was purely economic in nature", and Defendants' conduct "evinced no indifference to or reckless disregard for the health and safety of others". *Id.* at 576.

APPENDIX C

IN THE COURT OF APPEAL [*sic*]

STATE OF GEORGIA

TIME WARNER ENTERTAINMENT COMPANY, L.P.,
SIX FLAGS ENTERTAINMENT CORPORATION,
SIX FLAGS THEME PARKS INC., and
SIX FLAGS OVER GEORGIA, INC.,

Appellants/Defendants,

-against-

SIX FLAGS OVER GEORGIA, LLC, SIX FLAGS FUND, LTD. (L.P.), and GEORGE DEROY, as Trustee of the Six Flags Claims Trust,

Appellees/Plaintiffs.

Appeal No. A00A0120

REPLY BRIEF OF APPELLANTS

[October 22, 1999]

Walt M. Britt
Georgia Bar No. 083237
Chandler & Britt, LLC
4350 South Lee Street
Buford, GA 30518
(770) 271-2991

Evan R. Chesler
Keith R. Hummel
Cravath, Swaine & Moore
Worldwide Plaza
825 Eighth Avenue
New York, NY 10019-7475
(212) 474-1000

Attorneys for Appellants
Time Warner Entertainment
Company, L.P., Six Flags
Entertainment Corporation,
Six Flags Theme Parks Inc.,
and Six Flags Over Georgia, Inc.

* * *

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C. The Punitive Damages Are Excessive.

Plaintiffs incorrectly assert that the ratio of compensatory to punitive damages "insulates" the punitive damages award. The actual ratio is much higher than Plaintiffs claim because the compensatory damages award is itself grossly excessive. (Dft. Br. at 51-57) In any event, this ratio is *not* the legal standard for the validity of punitive damages. *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 582 (1996); *Hospital Auth. of Gwinnett County v. Jones*, 261 Ga. 613, 614, 409 S.E.2d 501, 502-03 (1991).

APPENDIX D

IN THE COURT OF APPEALS

STATE OF GEORGIA

TIME WARNER ENTERTAINMENT COMPANY, L.P.,
SIX FLAGS ENTERTAINMENT CORPORATION,
SIX FLAGS THEME PARKS INC., and
SIX FLAGS OVER GEORGIA, INC.,

Appellants/Defendants,

-against-

SIX FLAGS OVER GEORGIA, LLC, SIX FLAGS FUND, LTD. (L.P.), and GEORGE DEROY, as Trustee of the Six Flags Claims Trust,

Appellees/Plaintiffs.

Appeal No. A00A0120

APPELLANTS' MOTION FOR RECONSIDERATION

[July 21, 2000]

Walt M. Britt
Georgia Bar No. 083237
Chandler & Britt, LLC
4350 South Lee Street
Buford, GA 30518
(770) 271-2991

Evan R. Chesler
Keith R. Hummel
Cravath, Swaine & Moore
Worldwide Plaza
825 Eighth Avenue
New York, NY 10019-7475
(212) 474-1000

Attorneys for Appellants
Time Warner Entertainment
Company, L.P., Six Flags
Entertainment Corporation,
Six Flags Theme Parks Inc.,
and Six Flags Over Georgia, Inc.

* * *

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XI. THE COURT SHOULD RECONSIDER ITS DECISION WITH RESPECT TO ENUMERATION OF ERROR NUMBERS TWELVE, THIRTEEN AND FOURTEEN

The Court appears not to have considered controlling legal precedent cited by Defendants on pages 57-60 of their opening brief and 28-30 of their reply brief that mandate that the punitive damage award be stricken, or at least vastly reduced. In particular, we note the rule that, absent "circumstances of aggravation or outrage", *Tri-County Inv. Group, Ltd. v. Southern States, Inc.*, 231 Ga. App. 632, 638, 500 S.E.2d 22, 27-28 (1998), or fraud, *see Wilson Welding Serv. v. Partee*, 234 Ga. App. 619, 620, 507 S.E.2d 168, 170 (1998) (refusal to award punitive damages appropriate where there was no "significant amount of fraud"), punitive damages are not authorized. Further, the Court has overlooked the dictates of O.C.G.A. § 51-12-5.1, which requires that "specific intent to cause harm" had to be proved by clear and convincing evidence. O.C.G.A. § 51-12-5.1(b). The trial court's failure to instruct the jury on the standard of proof for the specific-intent finding was *per se* reversible error. *See Hammett v. Reynolds*, 243 Ga. 669, 671-72, 256 S.E.2d 354, 356-57 (1979). Finally, the Court has not, as is required by

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O.C.G.A. § 51-12-12(a), set aside the award as violating the Excessive Fines Clause of the Georgia Constitution because there is no "sensible relation between punishment and offense", *Colonial Pipeline Co. v. Brown*, 258 Ga. 115, 119-22, 365 S.E.2d 827, 831-33 (1988), and the Due Process Clauses of the Georgia and United States Constitutions, *see BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996).

APPENDIX E

No. 00-1875

IN THE

Supreme Court of the United States

TIME WARNER ENTERTAINMENT COMPANY, L.P., *et al.*,

Petitioners,

v.

SIX FLAGS OVER GEORGIA, LLC, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The Court Of Appeals Of The State Of Georgia

---

BRIEF FOR SIX FLAGS OVER GEORGIA, LLC, *ET AL.*, IN OPPOSITION

JAMES E. BUTLER, JR.
GEORGE W. FRYHOFER III
BUTLER, WOOTEN, SCHERFFIUS, FRYHOFER, DAUGHTERY, & SULLIVAN
2719 Buford Highway
Atlanta, Georgia 30324
(404) 321-1700

GERALD DAVIDSON, JR.
ANDERSEN, DAVIDSON & TATE
P.O. Box 2000
Lawrenceville, Georgia 30246
(770) 822-0900

EMMET J. BONDURANT II
Counsel of Record
H. LAMAR MIXSON
MICHAEL B. TERRY
JOSHUA F. THORPE
BONDURANT, MIXSON & ELMORE, LLP
3900 One Atlantic Center
1201 W. Peachtree St., NW
Atlanta, Georgia 30309
(404) 881-4100

Counsel for Respondents

* * *

[Page 7]

After their post-trial motion was denied, Petitioners appealed to the Georgia Court of Appeals. In their briefs in that court, no excerpts of which are included in the appendix to the petition despite Petitioners' obligations under Rule 14.1(g)(i) of this Court, *see infra* p. 11 n.13, Petitioners made only vague challenges to the punitive damages award. Under the heading "The Punitive Damages Are Excessive," Petitioners' "Brief of Appellants" included only two sentences alleging any due process violations. They cited *BMW* only as limiting the amount

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of punitive damages in cases involving "purely economic" harm; they made no reference at all to the "third guidepost" argument that forms the basis for Question 1 of their petition in this Court (reordered Question 2). Resp. App. 12a-13a. As for Question 2 of their petition in this Court (reordered Question 3), at no time did Petitioners assert or even insinuate to the Court of Appeals that the punitive damages award was constitutionally infirm because they lacked notice they could be liable for aiding and abetting breaches of fiduciary duty. Finally, with respect to their Question 3 (reordered Question 1), under the heading "Standard of Review," Petitioners *elected* not to urge that *de novo* review was constitutionally required; instead Petitioners requested the exact "abuse of discretion" standard they now challenge. Petitioners stated that "[t]his Court reviews for *abuse of discretion* rulings . . . for excessive damages." *Id.* at 12a (emphasis added).

. . .

[Page 9]

In reference to the alleged excessiveness of the punitive damages, Petitioners included only a naked citation to *BMW* but offered no discussion of its potential relevance. Resp. App. 17a-18a.

. . .

[Page 18]

Nor could the proper presentation of *some* due process claims under *BMW* adequately preserve separate ones; . . .

* * *

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. . . Petitioners made only the briefest mention of due process in their briefs in the Court of Appeals, and their argument and their citation to *BMW* were limited exclusively to the point that this case involves economic damages rather than threats to health and safety. Resp. App. 13a, 15a. This was clearly inadequate to constitute the proper presentation of any federal constitutional concerns they might have had about notice.

APPENDIX F

IN THE SUPREME COURT OF GEORGIA

CASE NO. S02C1177

TIME WARNER ENTERTAINMENT COMPANY, L.P.,
SIX FLAGS ENTERTAINMENT CORPORATION,
SIX FLAGS THEME PARKS, INC., and
SIX FLAGS OVER GEORGIA, INC.,

Defendants-Petitioners

vs.

SIX FLAGS OVER GEORGIA, LLC,
SIX FLAGS FUND, LTD. (L.P.),
and GEORGE DEROY, as Trustee
of the Six Flags Claims Trust,

Plaintiffs-Respondents

CASE NO. A00A0120 IN THE
GEORGIA COURT OF APPEALS

RESPONSE OF PLAINTIFFS TO DEFENDANTS – *SECOND* PETITION FOR WRIT OF CERTIORARI

H. Lamar Mixson
Ga. Bar No. 514012
Michael B. Terry
Ga. Bar No. 702582
Joshua F. Thorpe
Ga. Bar No. 710665
James E. Butler, Jr.
Ga. Bar No. 099625
George W. Fryhofer III
Ga. Bar No. 279110
Joel O. Wooten, Jr.
Ga. Bar No. 776350

BONDURANT, MIXSON & ELMORE, LLP
3900 One Atlantic Center
1201 West Peachtree Street, NW
Atlanta, Georgia 30309
(404) 881-4100

Gerald Davidson, Jr.
Ga. Bar No. 206600
DAVIDSON AND TUCKER, LLC
6700 Sugarloaf Parkway
Suite 500
Duluth, Georgia 30097
(678) 775-6853

BUTLER, WOOTEN, FRYHOFER, DAUGHTERY & SULLIVAN, LLP
2719 Buford Highway
Atlanta, Georgia 30324
(404) 321-1700
and
P. O. Box 2766
Columbus, GA 31902
(706) 322-1990

ATTORNEYS FOR PLAINTIFFS-RESPONDENTS

* * *

[Page 6]

Section I of the petition complains that every judge on the whole Court of Appeals erred by finding that Time Warner had abandoned its de novo constitutional challenge to the award of punitive damages by failing to enumerate that alleged error on appeal or to cite authority and argue in support of that proposition. The Court of Appeals' findings on these issues are unassailable. Further, Time Warner expressly requested an abuse of discretion review for the alleged excessiveness of the punitive damages award – not a de novo constitutional challenge. Court of Appeals Brief of Appellants at 17 (filed Sept. 20, 1999). This is not simply "the omission of an adverb" or "a supposed flaw in the body of [Time Warner's] brief" as Time Warner disingenuously claims. Petition at 9.

* * *

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ARGUMENT AND CITATION OF AUTHORITY

I. THE COURT OF APPEALS' CORRECT FINDING THAT TIME WARNER ABANDONED ITS DE NOVO CONSTITUTIONAL CHALLENGE PROVIDES NO BASIS FOR A GRANT OF CERTIORARI, ESPECIALLY WHEN THE COURT OF APPEALS WENT ON TO CONSIDER AND DECIDE THAT VERY EXCESSIVENESS CHALLENGE ON THE MERITS DESPITE THE ABANDONMENT.

The Court of Appeals' finding that Time Warner abandoned the very "de novo" constitutional challenge to the punitive damages award for which the case was remanded relies on settled principles of Georgia law. In reaching this unanimous finding, the whole court noted that Time Warner's enumerations of error failed to contain any allegation that the punitive damages violated any provision of the state or federal constitution, were "constitutionally excessive," or implicated any species of due process or other constitutional issue. *Six Flags II*, slip. op. at 13. But the Court did not base its finding solely on the enumerations failure. The Court noted that, even if the alleged error were "adequately enumerated," "the claim of error [was] abandoned because [defendants] failed to cite any relevant facts, give record citations, or present any legal analysis supporting that assertion." Slip op. at 14 (citing Court of Appeals Rule 27(c)(2), (3)).[6]

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[6] Confronted with the Court of Appeals' finding that Time Warner's enumerations and brief

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These findings are neither novel nor certworthy. They are based in the settled principle that litigation, even appellate litigation, must come to an end one day. Allowing a litigant to raise issues on appeal that were improperly enumerated and abandoned would be unfair and would also tend to make the appeals process interminable.[7]

There is an even *broader* reason Time Warner should be barred from asserting its claim for a de novo constitutional challenge: Time Warner *asked* the Georgia Court of Appeals to apply an "abuse of discretion" review to the alleged excessiveness of the punitive damages award. Specifically, Georgia Court of Appeals Rule 27(a) requires appellants to set forth, for each issue raised, the "standard of review" the appellate contends the Court should apply. In its Court of Appeals Brief of Appellants in the initial appeal, Time Warner expressly specified that the appropriate standard of review for its "excessiveness" issues was "abuse of discretion." Court of Appeals Brief of Appellants at 17 (filed Sept. 20, 1999). "A party will not be heard to complain of a ruling *which it sought* or to which it acquiesced." *Firstline Corp. v. Valdosta-*

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abandoned any claim to a de novo constitutional challenge. (*Six Flags II*, slip op. at 13-14), Time Warner fails to identify a single instance where it raised that issue in the Court of Appeals. Petition at 1, 11-15.

[7] In a bizarre twist, Time Warner seems to argue that plaintiffs "abandoned" the capacity to assert Time Warner's own "abandonment" of the de novo constitutional challenge in this appeal. Pretermitting whether a *party's* conduct could ever preclude a *court's* ability to enforce its own rules of appellate procedure, it is clear plaintiffs "abandoned" nothing – for the court or anyone else. Plaintiffs have repeatedly asserted the untimeliness of Time Warner's attempt to create a constitutional challenge following its initial appeal when none theretofore existed. *See, e.g.,* Plaintiffs' Response to Defendants' First Petition

for Certiorari (filed 8/28/00) at 2, ("it is too late for Time Warner to claim a 'constitutional' question"): *id.*, at 25-26 ("This Court may not grant certiorari to review constitutional arguments . . . not decided by the Court of Appeals."). Even *defendants* acknowledged plaintiffs' argument. *See Defendants'* Reply Brief in Support of First Petition for Certiorari (filed 9/20/00) at 9 ("Plaintiffs are simply wrong when they claim that defendants' challenge to the punitive damages award in this case as constitutionally excessive was waived.").

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Lowndes County Indus. Auth., 236 Ga. App. 432, 434, 511 S.E.2d 538 (1999) (emphasis added); *Spearman v. Georgia Bldg. Auth.*, 224 Ga. App. 801, 805, 482 S.E.2d 463, 466 (Ga. App. 1997) (one may not "complain of a judgment, order, or ruling that his own procedure or conduct aided in causing"); *Moody v. Dykes*, 269 Ga. 217, 221, 496 S.E.2d 907, 911 (1998) (same).

Finally, the Court of Appeals' finding that Time Warner abandoned this issue provides no basis for a grant of certiorari in this case because, despite Time Warner's procedural default, the Court of Appeals fully considered and correctly decided the abandoned challenge on the merits: "as a matter of judicial economy, we also review the punitive damages award de novo and apply the *Gore* guideposts." Slip op. at 15. That substantive inquiry is addressed in the next section.

But before returning to that final issue, plaintiffs must address some of Time Warner's more egregious misstatements relating to Time Warner's clear abandonment of the challenge it belatedly makes. First, Time Warner tries to leave the impression that the Court of Appeals' abandonment ruling broke some new ground. In fact, the opposite is true. The Court of Appeals did not announce or create any new principle that warrants

review by this Court. On the other hand, *Kent v. White*, a panel decision on which certiorari was never sought and which the whole court overruled in part in its decision below, did break new ground. *See Kent v. A.O. White, Jr., Consulting Engineer P.C.*, No. A01A0756 (Ga. Ct. App. Jan. 29, 2002). *Kent* had held that a Georgia Supreme Court remand to the Court of Appeals for reconsideration in light of new authority was to be viewed as a "sub silencio" holding by the Georgia Supreme Court that the application of the new authority had not been waived. *Kent*, slip op. at 12. Because *Kent's* inference of such a "sub-silencio" holding contradicted a long line of authority from this Court and the Court of Appeals, the Court of Appeals in the unanimous whole court decision below

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overruled *Kent v. White* and merely returned to the well-established status quo on those issues. *See Six Flags II*, slip op. at 5-7.[8] Further, the whole court's ruling also reaffirmed the longstanding rule under Georgia law that an argument not made in appellant's brief is abandoned and is not preserved for review.[9]

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[8] *See also South Ga. Med. Ctr. v. Washington*, 269 Ga. 366, 368 (1998) (issues not actually decided can be considered upon remand); *Shadix v. Carroll County*, 274 Ga. 560, 563, 554 S.E.2d 465, 468 (2001) ("it is only those issues actually considered and ruled upon by this Court that fall within 'law of the case' doctrine."); *Morgan v. Guaranty Nat'l Cos.*, 268 Ga. 343, 345 n. 1 (1997) (disapproving a Court of Appeals holding that the Supreme Court case established a rule of law "sub silentio"). *See also Middlebrooks v. Hillcrest Foods, Inc.*, 256 Ga.3d 1241, 1249 n. 5 (11th Cir. 2001) (in Georgia case, a trial court ruling on excessiveness of punitive damages would be reviewed for abuse of discretion where the challenge was not properly brought under federal due process clause so as to invoke *Cooper*); *Foster v. Time Warner Entm't Co., L.P.*, 250 F.3d 1189, 1194 n. 3 (8th Cir. 2001) (*de novo* review under *Cooper* is not

required unless defendant properly raises a federal due process challenge to the punitive damages).

[9] *See Williams v. State*, 219 Ga. App. 167, 168, 464 S.E.2d 404, 405 (Ga. App. 1995) ("The claims asserted in appellant's brief in support of this enumeration are the sole claims preserved for appellate review as to this matter. 'Any issue reasonably contained within an enumeration of error as to which there has not been any argument or citation of authority made in appellant's brief is deemed abandoned on appeal.' ") (citation omitted) (emphasis supplied); *Moore v. Winn-Dixie Stores, Inc.*, 214 Ga. App. 157, 158, 447 S.E.2d 122, 123 (Ga. App. 1994) ("Any issue reasonably contained within an enumeration of error as to which there has not been any argument or citation of authority is deemed abandoned on appeal.") (citations omitted), *overruled on other grounds, Robinson v. Kroger*, 268 Ga. App. 735, 493 S.E.2d 403 (Ga. 1997) (*Jenkins v. State*, 240 Ga. App. 102, 103 (1999) ("This court requires that appellants support enumerations of error with argument and citations to authority. Mere conclusory statements such as those made here are not the type of meaningful argument contemplated by that rule.") *See Peripety Group, Inc. v. Smith*, 237 Ga. App. 158, 162, 514 S.E.2d 262, 266 (Ga. Ct. App. 1999) ((" '[O]ur review is limited to those matters enumerated **and argued** by an appellant[.]' ") (citation omitted); *Ligon v. Bartis*, 2002 Ga. App. LEXIS 212 (2002) (absence of meaningful argument in brief authorizes Court of Appeals to treat claim as abandoned).

APPENDIX G

IN THE COURT OF APPEALS

STATE OF GEORGIA

TIME WARNER ENTERTAINMENT COMPANY, L.P., SIX FLAGS ENTERTAINMENT CORPORATION, SIX FLAGS THEME PARKS INC., and SIX FLAGS OVER GEORGIA, INC.,	§	
Appellants,	§	Case Number
vs.	§	A00A0120
SIX FLAGS OVER GEORGIA, LLC, SIX FLAGS FUND, LTD., (L.P.), and GEORGE DEROY, as Trustee of the Six Flags Claims Trust,	§	
Appellees.	§	

MOTION FOR EXPANSION OF PAGE LIMITS

[Page 1]

COME NOW Appellants/Defendants Time Warner Entertainment Company, L.P., Six Flags Entertainment Corporation, Six Flags Theme Parks Inc. and Six Flags Over Georgia, Inc. and file this motion requesting, under Court of Appeals Rules 23(e) and 41, an expansion of the page limits for the parties' briefs.

This is an appeal from a jury verdict in the amount of $454,296,000. The case is a business dispute between the partners that owned and operated the Six Flags Over Georgia theme park (the "Park"). The limited partner, Plaintiff Six

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* * *

In the light of the number of significant legal and evidentiary errors involved in this case, and the unprecedented size of the jury verdict, Appellants respectfully suggest that a 60-page limit for the parties' briefs is appropriate. Appellants request that they be permitted to submit a single, joint Appellants' Brief, not exceeding sixty (60) pages; that Appellees be permitted to submit a single, joint Appellees' Brief not exceeding sixty (60) pages; and that Appellants be permitted to submit a single, joint Reply Brief not exceeding thirty (30) pages. Appellants believe that such an extension is in the interest of justice as it would permit all parties adequately to address the numerous issues raised by this appeal and would assist the Court in considering and resolving these issues.

Respectfully submitted, this 1st day of September, 1999.

CHANDLER & BRITT, LLC
Attorneys for Appellants

WALT M. BRITT
Georgia Bar Number 083237

COURT OF APPEALS
of the State of Georgia

ATLANTA, September 3, 1999

The Court of Appeals hereby passes the following order:

A00A0120. TIME WARNER ENTERTAINMENT COMPANY, L.P. ET AL v. SIX FLAGS OVER GEORGIA, LLC, ET AL

Upon consideration of the motion for permission to file briefs in excess of 30 pages on behalf of the appellant in the above styled case, it is ordered that said motion be GRANTED.

Court of Appeals of the State of Georgia
Clerk's Office, Atlanta, Sep -3, 1999

I certify that the above is a true extract from the minutes of the Court of Appeals of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

Clerk.

William L. Martin III

APPENDIX G

IN THE SUPERIOR COURT OF GWINNETT COUNTY
STATE OF GEORGIA

SIX FLAGS OVER GEORGIA, LLC, SIX FLAGS FUND, LTD., (L.P.), and GEORGE DEROY, as Trustee of the Six Flags Claims Trust,	)	
Plaintiffs,	)	
vs.	)	CIVIL ACTION FILE NO.: 97-A-1939-1
TIME WARNER ENTERTAINMENT COMPANY, L.P., SIX FLAGS ENTERTAINMENT CORPORATION, SIX FLAGS THEME PARKS INC., and SIX FLAGS OVER GEORGIA, INC.,	)	
Defendants.	)	

Daily Transcript of proceedings before the Honorable James W. Oxendine, Gwinnett County Superior Court Judge, taken before Judy J. Smith, Certified Shorthand Reporter and Notary Public, on the 21st day of December, 1998.

* * *

I charge you that punitive damages, when authorized, are awarded not as compensation to a plaintiff but solely to punish, penalize or deter the defendant for conduct which causes harm or threatens to cause harm to the rights of persons within the state of Georgia.

[Pages 163-64]

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